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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ROGELIO ELOPRE, Defendant and Appellant.	B234520 (Los Angeles County Super. Ct. No. VA117032)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael L. Schuur, Judge. Affirmed as modified.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Rogelio Elopre appeals from the judgment entered after he was convicted of two counts of lewd conduct on a child under 14, one by force and one without force. We reject his contentions that the trial court: on its own motion should have instructed the jury with certain lesser included offenses, and should have given an instruction clarifying that breasts are not sexual organs; erred by not suppressing his statement to police investigators; and erred by not allowing both cross-examination and argument concerning whether the victim's hymen was still intact. Because the trial court erred in calculating his presentence custody credits, we modify the judgment to reflect the correct amount and affirm the modified judgment.

FACTS AND PROCEDURAL HISTORY

Rogelio Elopre was charged with five counts of sexual abuse after his former stepdaughter, C.E., told her mother, B., that Elopre had repeatedly molested her between 2005, when C.E. was nine years old, and 2008. According to C.E., Elopre continued to act as a caretaker for her and her brother even after Elopre and B. divorced in 2003.

The first incident occurred during the summer before C.E. entered fifth grade, when she fell asleep in her mother's room, but woke to find Elopre, who had his fingers inside her vagina.[1] Elopre told C.E. not to say anything to her mother, and C.E. complied because she was scared and nervous. This incident was the basis for count 1, a charge of non-forcible lewd conduct on a child under 14. (Pen. Code, § 288, subd. (a).)[2]

C.E.'s mother had recently remarried, and the family moved to a new home right before C.E. entered the fifth grade. Elopre continued to care for the children after school and had a key to the house. Sometime after moving to the new house, C.E. came home from school one day and Elopre told her to go into her mother's bedroom. Once inside that room, Elopre took off C.E.'s blouse, licked and kissed her breasts, and put his fingers

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[1] C.E.'s testimony was a little unclear when it came to the dates, but the information alleged that this event took place in 2005.

[2] All further undesignated section references are to the Penal Code.

inside her vagina. This incident was the basis of count 2, for lewd conduct on a child under 14 by force, duress, or fear. (§ 288, subd. (b)(1).)

C.E. said Elopre continued this pattern, including occasional acts of cunnilingus, almost every other day for the next few years. Elopre sometimes grabbed C.E.'s head and forced her to fellate him. One such incident was the basis of count 3, for aggravated sexual assault. (§ 269, subd. (a)(4).) Elopre would sometimes coerce C.E. into letting him put his fingers inside her vagina, with one such incident alleged as the basis of count 4 for aggravated sexual assault. (§ 269, subd. (a)(5).) C.E. also recalled an incident where she was with Elopre inside his car, waiting to pick up her mother from work, when Elopre had C.E. masturbate him. This incident was the basis of count 5, for forcible lewd conduct. (§ 288, subd. (b)(1).) The information also alleged that Elopre was ineligible for probation as to counts 1, 2, and 5 because those offenses involved substantial sexual conduct. (§ 1203.066, subd. (a)(8).)

The other evidence against Elopre came from police officers who interviewed him after he was read and had waived his *Miranda* rights.[3] The first two officers to conduct separate interviews got only flat denials from Elopre. The third, who was trained in special interrogation techniques, testified that Elopre took the same tack with her, but eventually said that C.E. came to his bed twice, where she tried to put his hand on her vagina, took his penis into her mouth, and then tried to rub her vagina on his face. Elopre told the officer that he rebuffed these advances.

Elopre testified and denied ever having sexual contact with C.E., or having told the third interviewing officer that he awoke with his penis inside the girl's mouth. He did wake up from a nap once to find C.E. crawling on him. He pushed her away, and when C.E. pulled at his pajamas, he told her to stop. He denied having a key to the house. He testified that his employment during parts of the period in question prevented him from being at the house at all, and produced employment records to back up his claim.

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

The jury convicted Elopre of counts 1 (non-forcible lewd conduct) and count 2 (forcible lewd conduct). He was acquitted of count 4 (aggravated sexual assault for digital penetration). The jury hung on counts 3 and 5, and those were dismissed. Elopre contends we should reverse the judgment because: (1) in connection with count 2 for forcible lewd conduct, the trial court should have instructed the jury on the lesser included offense of non-forcible lewd conduct because there was evidence no force was used; (2) as to both counts 1 and 2, the trial court should have instructed on the crime of battery because it is a lesser included offense of lewd conduct; (3) in connection with the section 288 lewd conduct-oral copulation counts, the court should have instructed the jury that breasts were not sexual organs because this omission misled the jury to determine that Elopre's oral contact with C.E.'s breasts was an act of oral copulation for purposes of the section 1203.066 substantial sexual conduct allegations; (4) his statement to the third interviewing officer about C.E. aggressively initiating sexual encounters with him should have been suppressed because the officer used a prohibited form of trickery that undermined his *Miranda* warnings; (5) the trial court should have let him ask the investigating police detective if she knew whether C.E.'s hymen was intact, and also erred by not letting him argue to the jury the lack of evidence that C.E. sustained injuries to her vaginal area; and (6) the trial court miscalculated his presentence custody credits.

DISCUSSION

1. *An Instruction on Non-Forcible Lewd Conduct as a Lesser Included Offense of Forcible Lewd Conduct Was Not Required*

Section 288, subdivision (a) describes the offense of non-forcible lewd conduct. It applies to any person who willfully commits any lewd or lascivious act on a child under age 14 with the intent of arousing, appealing to, or gratifying the sexual desires of that person or the child. The crime of forcible lewd conduct occurs when that same conduct

is committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person.[4] (§ 288, subd. (b)(1).)

In connection with his count 2 conviction for forcible lewd conduct, Elopre contends the trial court had a duty to instruct the jury on the lesser included offense of non-forcible lewd conduct even though he did not request such an instruction. That duty arose only if there was substantial evidence that could have supported a jury finding that no force was used. (*People v. Hayes* (2006) 142 Cal.App.4th 175, 181.) Elopre contends there was such evidence because C.E. testified that the count 2 incident was like the count 1 incident, where C.E. awoke to find Elopre's fingers in her vagina and no force was used. Elopre also contends that even though C.E. testified that Elopre used force and overcame her resistance during post-count 2 incidents, she never expressly said such force was used during the count 2 incident itself.

C.E.'s testimony that the count 2 incident was like the non-forcible, count 1 incident, must be placed in context. After describing the count 1 incident, where she awoke to find that Elopre had his fingers in her vagina, C.E. was asked if she recalled Elopre "doing things" to her after her family moved to its new home. C.E. said Elopre would kiss and lick her breasts and move his fingers in and out of her vagina. This took place in her mother's bedroom after she returned home from school and Elopre told her to enter that room. The prosecutor asked what would happen once inside the room, and C.E. said Elopre would take off her shirt and kiss and lick her breasts. The prosecutor asked again whether Elopre placed his fingers inside C.E.'s vagina, and she answered yes. The prosecutor then asked whether this was "similar to the previous occasion that you described?" and C.E. answered yes. The prosecutor asked if Elopre said anything while this took place, and C.E. said he told her "not to tell my mom."

Elopre contends that C.E.'s statement that the second incident was like the first one creates an inference that the second incident was non-forcible. We disagree. The first incident occurred when C.E. was asleep and she only became aware of the

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[4] We will use "force" as shorthand for the other components of section 288, subdivision (b)(1): violence, duress, menace, or fear of immediate bodily injury.

completed act of lewd conduct upon awakening. Because Elopre used no force other than that necessary to commit the count 1 lewd conduct, it was not forcible. (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1004-1005.) The count 2 incident, where Elopre ordered C.E. into her mother's room, removed her blouse, kissed her breasts, and fingered her vagina, occurred when C.E. was awake, and she cannot possibly have meant that the second incident was just like the first one in that sense. Instead, C.E.'s statement, which came in response to a question about Elopre fingering her vagina, can only mean that when he committed that particular act during the count 2 incident, that act was the same as what happened during the count 1 incident. Therefore, the inference that Elopre contends we must draw is not reasonable.

The count 2 incident took place after the count 1 incident, where Elopre warned C.E. not to tell her mother about what happened. She came home from school and was ordered into her mother's room, where Elopre took off her blouse and began to lick and kiss her breasts, then insert his fingers in her vagina. When describing such incidents in general, C.E. testified that she would sometimes refuse to go into her mother's room, but complied when Elopre yelled at her. Once there, she would sometimes resist by pushing, but he was bigger and stronger and was able to overcome her. The jury could have concluded this applied to the count 2 incident, but Elopre contends they were not required to draw that inference.

Assuming for the sake of discussion that he is correct, we conclude that the evidence shows conclusively that C.E. complied out of duress. Duress means a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary sensibilities to perform or acquiesce in an act to which they would not otherwise have submitted. (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13, disapproved on another ground in *People v Soto* (2011) 51 Cal.4th 229, 248, fn. 12.) Determining whether duress existed turns on the total circumstances, including the age of the victim and her relationship to the defendant. (*Id.* at pp. 13-14.) Duress may be found even if the victim testifies that the defendant did not use force or threats, particularly where the victim is a young child and the defendant is a much larger adult who occupies

a position as an authority figure in the child's life. (*Id.* at p. 14, and cases cited therein; *People v. Schulz* (1992) 2 Cal.App.4th 999, 1005.)

Elopre had been C.E.'s stepfather and, by virtue of his role as an after-school caretaker, still assumed the role of an authority figure in C.E.'s life. C.E. testified that in his caretaker role he often gave her instructions, which she obeyed because her mother told her to do so. After the count 1 incident, C.E. was scared and nervous and said that as a result, she did not tell her mother what had happened. Elopre was not just an authority figure, but was also much larger than C.E., who was 9 or 10 when the count 2 incident occurred. Based on this, no reasonable jury could find that C.E. willingly complied during that incident, or that it was the result of anything other than duress due to her relationship with Elopre, and the count 1 incident, where he told her to keep silent about what had happened. (*People v. Senior* (1992) 3 Cal.App.4th 765, 775 [warning a child not to report molestation reasonably implies that the child should not otherwise protest or resist the sexual assault].) Accordingly, we conclude the trial court did not err by failing to instruct the jury with the lesser included offense of non-forcible lewd conduct in connection with count 2.

2. *An Instruction on Battery Was Not Required*

Relying on *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1293-1294 (*Thomas*), Elopre contends that battery is a lesser included offense of both forcible and non-forcible lewd conduct, and that the trial court was required to instruct on that offense as to counts 1 and 2 even though he did not request such an instruction.

Elopre acknowledges that there is a split of authority among the various Courts of Appeal as to whether battery is a lesser included offense of lewd conduct under section 288. The court in *People v. Santos* (1990) 222 Cal.App.3d 723, 738-739, held that battery was not a lesser included offense of lewd conduct. The issue is now before our Supreme Court, which granted review of two recent decisions that reached opposite conclusions on this issue: *People v. Gray*, review granted December 14, 2011, S197749,

and *People v. Shockley*, review granted March 16, 2011, S189462.[5] He asks us to join those courts which have held that battery is a lesser included offense of lewd conduct.

We need not take sides in this dispute, however. As Elopre acknowledges, the instruction was not required unless there was substantial evidence that he committed a battery instead of an act of lewd conduct upon C.E. Elopre finds such evidence in two sources: (1) his statement to the police, where he said he twice awoke to find C.E. atop him, and pushed her away when she tried to fellate him, place his hand on her vagina, and rub her vagina on his face; and (2) in his trial testimony that he awoke to find C.E. crawling atop him and that he pushed her away. Assuming for the sake of discussion that battery is a lesser included offense of lewd conduct, we conclude that the evidence did not justify that instruction in this case.

Elopre's reliance on *Thomas, supra*, 146 Cal.App.4th at pages 1293-1294, to support this contention is misplaced. After concluding that battery was a lesser included offense of lewd conduct, the *Thomas* court considered whether the trial court committed prejudicial error by failing to give that instruction in regard to the testimony of two victims concerning three separate incidents. The first victim testified that the defendant got into bed with him and began touching him under his boxer shorts. The defendant admitted to the police that he once touched the victim's buttocks in order to wake him up, but denied putting his hand under the victim's shorts or having been sexually aroused. The *Thomas* court apparently assumed that the defendant's version of events would have supported a battery instruction, but held the error harmless due to the strong evidence against him. The first victim also testified that the defendant once touched his shoulder while the victim was playing a video game. The trial court's failure to instruct on battery as to that incident was prejudicial error because the jury could have found it was an innocent touching. (*Ibid.*)

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5 Elopre cites *People v. Gray* to support his contention that there was sufficient evidence to support a battery instruction. Because that opinion is now on review, however, it is not citeable. (Cal. Rules of Court, rules 8.1105(e)(1), 8.1115(a).)

The second victim testified that the defendant grabbed his buttocks and said "nice ass." The *Thomas* court said that because the touching was accompanied by a sexual comment, when combined with the evidence of the defendant's numerous other sexual offenses against other boys, no reasonable jury could have concluded the incident was merely an offensive touching that constituted a battery, as opposed to a lewd act under section 288. Accordingly, a battery instruction was not required as to that incident. (*Thomas, supra,* 146 Cal.App.4th at p. 1294.)

The incidents in *Thomas* that justified a battery instruction were defendant-initiated physical contacts that could have been free of any sexual intent under section 288, but could have been considered a battery under section 242, where only a slight unprivileged touching is needed to satisfy the force requirement. (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 860, fn. 2.)

Elopre's version of events was much different, however. Instead of initiating a physical contact that could have been a battery, Elopre claimed he merely pushed C.E. away when *she* tried to initiate sexual contact with *him*. If Elopre had been charged with battery, and had his version of events been believed, he would have been acquitted because the physical contact he made in response to C.E.'s unwanted advances was a protected form of self-defense. (§§ 692, subd. (1), 693, subd. (1) [a party about to be injured is entitled to make lawful resistance sufficient to prevent an offense against his person]; *People v. Duchon* (1958) 165 Cal.App.2d 690, 693 [a battery cannot be committed by acts done in self-defense].) In short, under Elopre's version of events, he did not commit a battery at all. Therefore, even if battery were a lesser included offense of lewd conduct, there was not sufficient evidence to require such an instruction.

3. *An Instruction Clarifying That Breasts Are Not Sexual Organs Was Not Required*

The jury found true the allegations under section 1203.066 that Elopre had substantial sexual contact with C.E. when he committed the crimes charged in counts 1 and 2. The statute defines substantial sexual contact to mean "penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign

object, oral copulation, or masturbation of either the victim or the offender." (§ 1203.066, subd. (b).) The jury was instructed that substantial sexual contact "means penetration of the vagina of the victim by a foreign object, oral copulation or mast[u]rbation of either the victim or the defendant. [¶] Masturbation is defined as any contact, however slight, of the sexual organ of the victim or the defendant with the intent to arouse sexual desire in either person. Masturbation may occur under or over the clothing." In connection with the section 288 forcible lewd conduct-oral copulation count, the jury was instructed that oral copulation "is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person."

Pointing to a variety of non-legal sources, Elopre contends that although breasts are not technically sexual organs, they are commonly considered as such. Because the meaning of sexual organ was not defined in the instructions for the forcible oral copulation count, and because the term "sexual organ" does not have a plain, unambiguous meaning, he contends the trial court had a sua sponte duty to clarify its instruction and advise the jury that breasts are not sexual organs. According to Elopre, the trial court's failure to make this clarification as part of the section 288 instruction spilled over into the section 1203.066 substantial sexual contact instruction, misleading the jury to mistakenly believe that Elopre committed oral copulation when he kissed and licked C.E.'s breasts, and therefore carry that mistake over into its findings that he committed substantial sexual contact.

Elopre reasons that even though count 1 involved only digital penetration, the jury somehow might have concluded that it also involved licking and kissing C.E.'s breasts, as occurred on other occasions. As a result, the jury could have based its findings on the two section 1203.066 allegations on breast contact alone in the mistaken belief that licking C.E.'s breasts constituted oral copulation.

Elopre contends this is the only possible explanation for the jury's decision to acquit him of count 4, which involved digital penetration of the vagina, while convicting him of count 2, which also involved digital penetration of the vagina and breast contact, and which took place during the same period as the count 4 incident. According to

Elopre, there was no reason to convict him of count 2 based on digital penetration, yet acquit him of count 4 for digital penetration. As a result, he contends, the count 2 conviction must have been based on breast contact.

When determining whether a jury instruction was ambiguous, we consider the instructions as a whole and ask whether there was a reasonable likelihood the jury misconstrued or misapplied the challenged instruction. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061.) When the instructions are read as a whole, we do not believe the jury could have been confused by the instruction and somehow based its findings of substantial sexual contact on the notion that he committed oral copulation when he licked and kissed C.E.'s breasts.

First, the oral copulation instruction included language that Elopre does not mention: after stating that oral copulation involved contact between the mouth of one person and the sexual organ of another, the instruction concluded with the clarification that "[p]enetration is not required." Of course, mouth to breast contact never involves penetration, and this language by itself would have alerted the jury to the fact that oral copulation did not involve such conduct.

Second, after stating that vaginal penetration, oral copulation, or masturbation each amount to substantial sexual contact, the section 1203.066 instruction defined masturbation as "any contact, however slight, of the *sexual organ* of the victim or the defendant with the intent to arouse sexual desire in either person. Masturbation may occur under or over the clothing." The common dictionary definition of masturbation is the manipulation of one's own genitals, or the genitals of another. (*People v. Chambless* (1999) 74 Cal.App.4th 773, 785, fn. 6), and under the common dictionary definition, "sexual organs" refers to external genital reproductive organs. (*People v. Catelli* (1991) 227 Cal.App.3d 1434, 1450-1451.)

Under Elopre's theory, a jury might also conclude that masturbation occurs from fondling a victim's breasts because breasts are sexual organs. Given the common, everyday meaning of the term "masturbation," however, no reasonable jury would conclude that the term sexual organ for purposes of masturbation referred to breasts.

Instead, when looking at the masturbation component of the section 1203.066 instruction, the jury would have to conclude that the term "sexual organ" referred to genitalia. By the same token, the jury could not then interpret oral copulation by way of oral contact with the victim's sexual organs to mean mouth-to-breast contact.

Therefore, we conclude that when the instructions are read as a whole, the jury could not possibly interpret them to mean that oral copulation for purposes of the substantial sexual contact allegations could be accomplished by licking or kissing of the breasts, and therefore no instructional error occurred.

4. The Police Detective's Deceptive Techniques Did Not Violate Elopre's Miranda Rights

A. Applicable Law

Under the due process clause of the Fourteenth Amendment to the United States Constitution, involuntary statements by a criminal suspect that a law enforcement officer obtained by coercion are inadmissible in criminal proceedings. (*People v. Neal* (2003) 31 Cal.4th 63, 67.) In *Miranda v. Arizona, supra,* 384 U.S. 436, the United States Supreme Court held that before the police may question a suspect, they must first advise him of his rights to remain silent and to have a lawyer present during questioning. A suspect's *Miranda* rights may also be violated if the officers properly inform the suspect of those rights, but use deceptive tactics that render any statements involuntary under all the circumstances. (*Hart v. A.G. for Fla.* (11thCir. 2003) 323 F.3d 884, 893.)

Elopre contends that the statements he made to the third detective who interviewed him concerning C.E.'s alleged improper sexual advances to him were obtained by trickery and were therefore involuntary because the detective told him in essence that she was there to help him and was working for him.

No single factor is dispositive when evaluating whether a suspect's statement was voluntary. Factors relevant to this determination include the existence of police coercion, and the length, location, and continuity of the interrogation, along with the defendant's maturity, education, physical condition, and mental health. (*People v. Williams* (2010)

49 Cal.4th 405, 436.) The essential question is whether the statement was the product of free will and choice, or whether the defendant's will was overborne and his capacity for self-determination critically impaired by coercion. The courts prohibit only those psychological ploys which are so coercive that they tend to produce a statement that is both involuntary and unreliable. (*Ibid.*) A statement is not involuntary unless the coercive police conduct and the statement are causally related. (*Id.* at p. 437.)

On appeal, the trial court's factual findings concerning the circumstances surrounding the statement are upheld if they are supported by substantial evidence, but we independently review the trial court's conclusions concerning whether the statement was voluntary. (*People v. Williams, supra*, 49 Cal.4th at p. 436.)

B. Facts From *Miranda* Suppression Hearing

Elopre did not make a pretrial motion to suppress his statements to the police. Instead, the motion came late in the trial during the testimony of the third detective to interview him, after the first police interviewer had already testified to overhearing the third interview.

Sheriff's Detective Doreen Evans was the lead investigator on the case. Evans testified that after arresting Elopre, she read him his *Miranda* rights. Although Elopre waived his *Miranda* rights and agreed to a videotaped interview, he denied C.E.'s allegations. Evans then brought in another detective to interview Elopre, who once again gave a videotaped interview where he denied any misconduct. Evans then decided to bring in Deputy Michele Brown, an interrogation specialist.

According to Evans, Elopre spent the night in jail and met with Brown the next morning. Evans testified that she observed most of Brown's three-hour interview with Elopre. Although Elopre at first denied any sexual misconduct, Evans said that Elopre eventually admitted to having sexual contact with C.E. When Brown was through interviewing Elopre, Evans met with him again to discuss the statements he had just made to Brown. According to Evans, Elopre said that on two occasions he woke up and found that C.E. had his penis in her mouth. Elopre said C.E. was very aggressive and

grabbed his hand and put it on her vagina, and then tried to rub her vagina on his face. Elopre said he pushed the girl off of him. That interview was also videotaped.

Deputy Brown testified later on about her interview with Elopre. She began by discussing her interrogation training, including something known as the Reid Technique, which involves establishing a rapport with a suspect and developing their trust. This involves sitting directly across from the suspect, then making eye contact and knee-to-knee or hand-to-knee body contact. The technique also involves a display of empathy "in that you're kind of there for them. That you're . . . going to be there for them and that it's ok." She does not wear a uniform and does not identify herself as part of law enforcement. She then tells them "that I am not been hired *[sic]* by the detective. I am tell them *[sic]* I was not hired by you. So, if I am there working for anybody I am here to help you."

This testimony prompted an objection by Elopre's lawyer, along with a motion to suppress Elopre's statements to the detectives, because Deputy Brown's interrogation techniques fooled Elopre into thinking she was on his side "almost in [the] capacity of an attorney," and therefore violated his *Miranda* rights. The trial court deferred a ruling because Brown had not yet testified about Elopre's statements to her. Brown later testified that she used these techniques on Elopre and advised him of his *Miranda* rights. She said that Elopre waived those rights and agreed to a videotaped interview. When she was asked what Elopre had said, defense counsel renewed the objection.

The trial court said that "police officers are allowed to lie to somebody to get a confession," such as when two robbery suspects are separated and each is told that the other one had confessed and implicated him. The trial court overruled the objection "because he was *Mirandized.* And he'd already gone through two interviews before, so he pretty much knew what was going on . . . ."

C. The Deceptive Interrogation Technique Did Not Induce Elopre's Statements

Elopre contends that Deputy Brown's interrogation tactics employed a form of deceptive coercion known as the "false friend" ploy, a term first coined in *Spano v. New York* (1959) 360 U.S. 315 (*Spano*). In that case, the defendant called a long-time friend who was a police officer to say that he had just killed a man following a dispute. The defendant was eventually brought in for questioning, but his lawyer told him not to say anything to the police. After the lawyer left, the defendant's police officer friend, acting on orders, made four attempts to obtain a statement from the defendant by falsely claiming that the defendant's initial phone call had gotten the young officer in trouble and jeopardized his job. The defendant refused to say anything, but finally relented during the fourth attempt and confessed. The Supreme Court held that the confession was coerced because the defendant's will was overborne by a protracted series of interrogations, culminating in the numerous appeals to sympathy by his false friend. (*Id.* at pp. 321-323.)

Spano's reasoning was applied in *People v. Adams* (1983) 143 Cal.App.3d 970 (*Adams*), where the defendant was convicted of murder in the shooting death of her boyfriend.[6] Although she initially denied killing the victim, she eventually confessed after the Kern County Sheriff, who knew defendant through their church, appealed to her religious convictions during a lengthy discussion. The sheriff played on the defendant's guilt for having lived with the victim while unmarried, and her fear of going to a mental institution. The defendant testified at the suppression hearing that she considered the sheriff to be a friend, and that she changed her story and confessed because she feared going to a mental hospital, and also feared eternal damnation. The *Adams* court held that the confession had been coerced by the sheriff's improper use of the defendant's religious

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[6] *Adams* was overruled on another ground in *People v. Hill* (1992) 3 Cal.4th 959, 995, footnote 3, which was itself overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, footnote 13.

beliefs as a weak spot to overcome her will and obtain her confession. (*Id.* at pp. 987-990.)

We admit that we are troubled by Deputy Brown's statements that she "had not been hired by the detective" and that if she was "there working for anybody I am here to help you." Combined with the fact that she was not in uniform and did not identify herself as a deputy, these statements involved a form of trickery which, under the right circumstances, could undermine the *Miranda* warnings she gave by leading a suspect to conclude that speaking with her was to his benefit and that his statements would not be used against him. However, those circumstances are not present here. In explaining our conclusion, we turn back to the events that led to Elopre's incriminating statements.

First, Elopre had been in custody overnight after having twice waived his *Miranda* rights and given interviews where he denied any sexual misconduct or contact with C.E. Second, he concedes on appeal that he knew Brown was a deputy, thereby ameliorating Brown's deceptive statement that she had not been hired by the detective, along with her failure to identify herself as a deputy. Third, Elopre also admits that Brown read him his *Miranda* rights, and that he once more waived those rights. Fourth, Brown's deceptive statement that she was there to work for Elopre came at the start of the interview. Despite that softening-up technique, Elopre responded to Brown just as he had with the two investigators who interviewed him the day before – with a flat-out denial of wrongdoing.

Brown testified that her initial appeals to Elopre concerned being honest and how he would feel better if he admitted what happened because he would not have to live with the guilt. Elopre continued to deny any wrongdoing, but finally started talking more about C.E., and how teenage girls looked older now than they had when he was young. At this point, Brown testified, Elopre's "demeanor started to change. He started to relax a little bit. He started to become a little bit more open. Had started to nod, which is usually an indication to me that it is a theme that they're agreeing with." In response, Brown began talking about C.E. and whether she was aggressive for her age. Elopre agreed, and then "his story started to change." It was at that point that Elopre described

the incidents where he claimed C.E. became sexual with him. Brown confirmed that this all came from Elopre, and that he opened up after the topic turned to whether C.E. might have been the aggressor.

In short, Brown's deceptions did not cause Elopre to incriminate himself. Instead, during the first part of his interview, right after Brown's deceptive statements, he continued to deny any wrongdoing. Elopre made the damaging statements only after *he* turned the topic to the sexually precocious appearance of teenage girls, leading Brown to wonder whether C.E. had been the aggressor. Furthermore, his motive for those false exculpatory statements was the same as his earlier denials – to avoid criminal responsibility. (*People v. Tate* (2010) 49 Cal.4th 635, 684.) As a result, based on our independent review, we conclude that Elopre's statements were not causally related to Brown's deceptive tactics. (*People v. Williams, supra,* 49 Cal.4th at p. 437.)

5. *The Trial Court Did Not Err By Excluding Evidence and Argument About the Lack of Medical Evidence Concerning the Condition of C.E.'s Hymen*

On cross-examination, Detective Evans acknowledged that no medical exam of C.E. had been performed. On redirect, Evans explained that such an exam would normally occur within 96 hours of an alleged assault, but did not in this case because C.E. reported the crimes long after they took place. On recross-examination, defense counsel asked Evans, "So, you don't know if her hymen is still intact or not?" The prosecutor objected on the ground that the question called for an expert opinion. The trial court said that this was "outside [Evans's] expertise," and that Evans "doesn't know anything because she never had a doctor examine her."

Defense counsel tried to raise this issue during jury argument. Counsel told the jury that there should have been signs of injury, such as scratches or bloody underwear, if Elopre had been digitally penetrating C.E. as often as she alleged. The prosecutor objected, noting that it was fair to comment on the absence of a medical examination, but that the argument about injuries was speculation. The trial court agreed.

Defense counsel then argued that: "There is no medical evidence at all. The court has told you that. I even asked about the hymen, and of course [the prosecutor] objected to that. But, the court said, well, they don't know because there was no medical exam. If that has been going on every other day for three years, I'm sure the hymen would have been broken. And that would have been of some interest." The prosecutor objected again, and the court sustained the objection, telling the jury that "we don't know whether it would have been or not because we don't have any medical testimony in that regard."

During closing argument, the prosecutor pointed out to the jury that there had been no evidence concerning the possibility of damage to a hymen from digital penetration, accusing defense counsel of asking the jury to speculate when he could have brought in an expert witness if he wanted to explore the issue. No objection was made to that statement.

Elopre contends that the trial court's rulings limiting his cross-examination of Detective Evans and restricting his jury argument were wrong because the notion that repeated digital penetration will rupture the hymen is a matter of common knowledge that does not require expert opinion testimony. The end result of this, he contends, is that the trial court prevented the jury from applying Evidence Code section 412, which would have allowed it to view the prosecution's evidence with distrust because it failed to offer stronger evidence – the results of a medical examination – when it was within its power to do so.

Elopre's argument is flawed in several respects. First, although he cites several decisions concerning the general rule that no expert testimony is required for matters of common knowledge, none concern this issue. We therefore deem that issue waived.[7]

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[7] We have found no reported decisions by our state's appellate courts holding that the circumstances under which a sexual assault victim's hymen will rupture is a matter of common knowledge that does not require expert testimony. By contrast, there is no end of reported decisions that involve expert testimony on just that point. The decision in *People v. Fontana* (2010) 49 Cal.4th 351 (*Fontana*) suggests that the topic requires expert testimony.

Second, the factual predicate for his contention concerning the potential for damage to C.E.'s hymen or other visible injuries is missing. Although C.E. testified that Elopre moved his fingers quickly in and out of her vagina, she was never asked by either party, and therefore did not testify, as to how deeply Elopre would embed his fingers or whether this conduct caused her any pain or discomfort.

Third, as far as the disputed question asked of Detective Evans, it was effectively answered. Defense counsel asked her to confirm that she did not know whether C.E.'s hymen had been ruptured, and the trial court told the jury that Evans did not know because no medical exam had been performed.

Fourth, as far as the Evidence Code section 412 instruction is concerned, none was required because none was requested (*People v. Jurado* (1972) 25 Cal.App.3d 1027, 1033) and because there was in fact no better evidence for the prosecution to produce (*People v. Simms* (1970) 10 Cal.App.3d 299, 312-313). Alternatively, we hold that failure to give the instruction was not prejudicial because the failure to produce better evidence was explained, and the jury was told by the court that the failure to conduct a

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The *Fontana* court considered the trial court's refusal to hold a hearing under Evidence Code section 782 in order to determine whether evidence of a sexual assault victim's other sexual activities on the day of the attack was admissible as an alternative explanation of why oral injuries that the victim attributed to forcible oral copulation occurred when she had sex with someone else.

In holding that the trial court erred by not holding such a hearing, the *Fontana* court considered and rejected the Attorney General's reliance on *United States v. Payne* (9th Cir. 1991) 944 F.2d 1458 (*Payne*). The court in *Payne* held that the statutory rape defendant's failure to produce expert evidence to support his claim that the victim's hymen could have ruptured from engaging in heavy petting with another boy meant that the exclusion of evidence concerning that other incident was proper because evidence of that incident was more prejudicial than probative. (*Payne* at pp. 1468-1469.)

By contrast, the *Fontana* court held, the defendant in its case "did offer expert testimony that consensual oral copulation [on the victim by someone else] could explain the victim's injuries, and had a specific, articulable basis for inquiring whether she had engaged in such conduct that morning." (*Fontana, supra,* 49 Cal.4th at p. 368, fn. 1.) Therefore, the Evidence Code section 782 hearing was required. Lurking beneath the surface of *Fontana,* we believe, is the notion that expert medical testimony is required when trying to establish the cause of vaginal injuries due to an alleged sexual assault.

medical examination of C.E. was properly before it. (*Rivera v. Goodenough* (1945) 71 Cal.App.2d 223, 234.)

6. *The Abstract of Judgment Must Be Modified to Show the Correct Amount of Presentence Custody Credits*

When the trial court sentenced Elopre, it awarded him 281 days of actual custody credits and 42 days of good conduct credits, representing 15 percent of the actual custody credit award. (§ 2933.1.) However, the abstract of judgment states that Elopre received 41 days of good conduct credits. Elopre contends, and respondent concedes, that the abstract of judgment must be modified to state the correct number of credits. We will order that modification as part of our disposition.

DISPOSITION

The judgment is modified to reflect presentence good conduct custody credits of 42 days. As so modified, the judgment is affirmed. The superior court is ordered to prepare an amended abstract of judgment and transmit it to the Department of Corrections.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.